(2)

No. 96-1370

In The

Supreme Court of the United States

October Term, 1996

In re:

DENISE RENEÉ BEASLEY.

FIDELITY FINANCIAL SERVICES, INC.,

Petitioner,

vs.

RICHARD V. FINK, Trustee,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD V. FINK, Trustee
Counsel of Record
Attorney for Respondent, Pro Se
818 Grand Boulevard
Suite 700
Kansas City, MO 64106-1910
(816) 842-1031

70861

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, inc.

19 pp

QUESTIONS PRESENTED

1. Whether when the parties are before the Bankruptcy Court, the Bankruptcy Code's definition of when a transfer is perfected should prevail over the state law's definition?

2. Whether concerns which gave rise to the earlier disparate Circuit opinions favoring state law have since been addressed by Congress and are not "important matters" compelling review by this Court?

3. Since the 1994 amendment to 11 U.S.C. § 547, Circuit opinions have uniformly agreed on the interpretation that Bankruptcy law trumps state law, so this issue is not an important question of federal law which has not been, but should be, settled by this Court.

TABLE OF CONTENTS

Contents

TABLE OF CITATIONS

Cases Cited:

Contents

Contents

RELEVANT STATUTES INVOLVED

11 U.S.C. § 547 (1994) provides, in pertinent part:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property —

Prerequisites for lien avoidance

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made —

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if —

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer —

Contemporaneous Exchange Exception

(1) to the extent that such transfer was —

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

. . . [or]

(3) that creates a security interest in property acquired by the debtor —

Purchase Money Security Interest or Enabling Loan Exception

(A) to the extent such security interest secures new value that was —

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

. . .

(e)(1) For the purposes of this section —

. . .

Perfected Defined

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made —

When Transfer Made

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after,

such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of —

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

Burdens of Proof

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the

nonavoidability of a transfer under subsection (c) of this section.

REASONS FOR DENYING THE WRIT

I.

WHETHER WHEN THE PARTIES ARE BEFORE THE BANKRUPTCY COURT, THE BANKRUPTCY CODE'S DEFINITION OF WHEN A TRANSFER IS PERFECTED SHOULD PREVAIL OVER THE STATE LAW'S DEFINITION?

The Trustee argues Ms. Beasley's grant to Fidelity of a security interest within ninety days of filing her bankruptcy is avoidable; and, pursuant to 11 U.S.C. § 547(g), he has met his burden of proving the avoidability of this transfer. First, Ms. Beasley gave a security interest in her 1994 Ford Probe to Fidelity for a debt she owed as of August 17, 1994, satisfying the creditor benefit element of 11 U.S.C. § 547(b)(1). Second, Fidelity did not perfect its lien within the ten-day grace period. Thus the transfer was made when perfected, twenty-one days later. Consequently, the debt was antecedent to the transfer. 11 U.S.C. § 547(b)(2). Third, Debtor's insolvency was not in dispute. 11 U.S.C. § 547(b)(3). Fourth, as Fidelity was not an insider, the 90-day deadline of 11 U.S.C. § 547(b)(4) applied and was met. Finally, the preference enabled Fidelity to receive more than it would have if the transfer had not been made. 11 U.S.C. § 547 (b)(5).

The burden shifts to Fidelity to prove the transfer comes within one of the exceptions to the avoiding power. 11 U.S.C. § 547(g). Did it satisfy the requirements of the purchase money security interest exception of 11 U.S.C. § 547(c)(3)? The Trustee acknowledges the creditor's success under § 547(c)(3)(A). It

was an enabling loan. But Fidelity stumbled at § 547(c)(3)(B)'s twenty-day requirement. It did not perfect the security interest on or before twenty days after Ms. Beasley received her vehicle.

Fidelity relies upon the thirty-day relation back provisions of Mo. Rev. Stat. § 301.600.2 (1994) to escape the consequences of the plain meaning of the Bankruptcy Code. Its reliance is misplaced.

Returning to 11 U.S.C. § 547(e)(1)(B), a transfer is perfected "when a creditor on a simple contract **cannot** acquire an interest that is superior to the interest of the transferee." The Supreme Court views the plain language of the Bankruptcy Code as determinant in its interpretation of statutory provisions. *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992). If a judgment creditor had executed on Ms. Beasley's vehicle within thirty days of the granting of the security interest, could Fidelity hope to triumph if the title documents were mailed after the thirtieth day? Definitely not. The only chance Fidelity would have of winning the hypothetical state court priority battle would be to prove the requisite documents were mailed within the state law's thirty-day relation back period. But even so, the judicial lien creditor would have a better interest than Fidelity's, however fleeting, until that superior interest was dethroned by the artificial relation back provision of Missouri law. So, a creditor on a simple contract could have acquired an interest superior to the interest of the transferee, Fidelity. 11 U.S.C. § 547(e)(1)(B).

Fidelity perfected its lien within the thirty days the Missouri statute allows for the perfection of the lien to relate back to its creation. But, Fidelity took twenty-one days to mail the appropriate documents and fee to the Missouri Department of Revenue; and guided by the twenty days allowed in § 547 of the Bankruptcy Code, Bankruptcy Judge Koger avoided Fidelity's

lien as a preference on the grounds it was one day late. The District Court affirmed as did the Eighth Circuit.

At first blush, the result may seem unfair. Scholars weighing in on this issue, however, posit that clear and generous preference legislation becomes murky in its application because it transgresses the common sense of market norms and because courts cannot find "subversive collusion between debtor and favored creditor." Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 Stan. L. Rev. 3, 11 (1986). Accord, White and Summers, *Uniform Commercial Code* § 25-7, pages 447-48 (3d ed. 1988). Both cited *In Re: Walker*, 161 B.R. 484 (Bkrtcy. D. Idaho 1993).

In summary, the issue is not really between the debtor and the creditors; but, it is one of creating a level playing field for all of the unsecured creditors. After all one purpose of the Bankruptcy Code is to stop the "race to the courthouse."

II.

WHETHER CONCERNS WHICH GAVE RISE TO THE EARLIER DISPARATE CIRCUIT OPINIONS FAVORING STATE LAW HAVE SINCE BEEN ADDRESSED BY CONGRESS AND ARE NOT "IMPORTANT MATTERS" COMPELLING REVIEW BY THIS COURT?

Bear in mind the fluid nature of 11 U.S.C. § 547(c)(3)(B). Before 1986, it read "that is perfected before 10 days after such security interest attaches." Thereafter, Congress changed it to "that is perfected on or before 10 days after the debtor receives possession of the property." Since October, 1994, the statute provides "on or before 20 days after the debtor receives possession of the property." Judge Koger in the underlying

Beasley opinion astutely cited *In Re: Walker,* 161 B.R. 484 (Bkrtcy. D. Idaho 1993). In that case the parties stipulated that all the requirements of a preference were present except whether the transfer of the security interest in the vehicle was "for or on account of an antecedent debt." 11 U.S.C. § 547(b)(2). If the transfer was found to be for an antecedent debt, the lender sought the protection of the enabling loan exception to preference avoidance. The lender cited an Idaho statute drafted "*solely* as a means of defending its beneficiaries against avoidance of their security interest in federal bankruptcy proceedings" (emphasis in the original) *Id.* at 499. In ruling against the lender the Court noted as an aside:

> Interestingly, Senate Bill No. 540, a comprehensive set of amendments to the Bankruptcy Code is currently under consideration in Congress. One such change proposed by the bill would be to extend the Section 547(c)(3) grace period to 20 days from the present 10 days because most states have now adopted longer periods for perfection of purchase money security interests. If Defendant's position is correct, and state relation back statutes are already operative under the statute, it is curious that some in Congress feel the need for an amendment to the Code.

S. Rep. No. 103-168, 103d Cong. (1993). *Id.* at 499.

III.

SINCE THE 1994 AMENDMENT TO 11 U.S.C. § 547, CIRCUIT OPINIONS HAVE UNIFORMLY AGREED ON THE INTERPRETATION THAT BANKRUPTCY LAW TRUMPS STATE LAW, SO THIS ISSUE IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A lender argued to the Fifth Circuit the applicability of the Texas Uniform Commercial Code twenty-day grace period instead of the 11 U.S.C. § 547(c)(3)(B) ten- now twenty-day period. This lien was perfected in thirteen days. *In Re: Hamilton,* 892 F.2d 1230 (5th Cir. 1990). The Fifth Circuit held that bankruptcy law prevailed and the lien was avoided.

By the end of 1990, the Eleventh Circuit rewarded a creditor's argument that state law grace periods can allow the perfection of a lien to relate back to its creation and therefore come within the ten- now twenty-days of 11 U.S.C. § 547(c)(3)(B). *In Re: Busenlehner,* 918 F.2d 928 (11th Cir. 1990), *cert. denied,* in *Moister v. General Motors Acceptance Corp.,* 500 U.S. 949, 111 S. Ct. 2251, 114 L. Ed. 2d 492 (1991). Fidelity purports that a departure from the *Busenlehner* holding will result in commercial disaster. However, Fidelity is being overly dramatic.

Bankruptcy Judge Wilson took Fidelity's chamber of horrors argument, *vis-a-vis Busenlehner,* head on when he wrote in *In re: Holloway,* 132 B.R. 771 (Bkrtcy. N.D. Ok. 1991) at page 774:

> The [*Busenlehner*] court reached this result because "Debtors should not be given the ability to surprise and upset established

> commercial practices by filing for bankruptcy and avoiding this otherwise acceptable security interest," and to prevent "legitimate commercial practices" from being "penalized," *id.* But "Debtors" were not trying to avoid the security interest on their own behalf; rather, the bankruptcy Trustee was trying to avoid it for the sake of other creditors as a group. Moreover, most transfers attached under Section 547 are "legitimate . . . established commercial practices;" it is preferential effect, not illegality or evil intent, which Section 547 aims to redress.

The Tenth was the last Circuit to have a say in the matter before District Judge Smith affirmed Judge Koger in the case at bar. *In Re: Hesser,* 984 F.2d 345 (10th Cir. 1993). The creditor took the tack that one of the five basic requirements of 547(b) had not been met, i.e., that the transfer of the security interest was not "for or on account of an antecedent debt," and the Tenth Circuit agreed. However, this opinion was rendered prior to the 1994 amendments changing the enabling loan grace period from ten to twenty days.

On February 26, 1996, the United States Court of Appeals for the Ninth Circuit weighed into the fray with *In Re: Walker,* 77 F.3d 322 (9th Cir. 1996). Siding with *Hamilton, supra,* the Ninth Circuit held the Bankruptcy Code's definition of when a transfer is perfected trumps the law of the state and the state's relation back provision cannot save it.

" 'What constitutes a transfer and when it is complete' is matter of federal law." *Barnhill v. Johnson,* 503 U.S. 393, 397, 112 S. Ct. 1386, 1389, 118 L. Ed. 2d 39 (1992) (*quoting*

McKenzie v. Irving Trust Co., 323 U.S. 365, 369-70, 65 S. Ct. 405, 407-08, 89 L. Ed. 305 (1945)). *Id.* at 323.

Thereafter, the Eighth Circuit ruled in the case at bar agreeing with the Ninth Circuit. The Fifth Circuit reiterated its position on December 16, 1996, with *Matter of Locklin,* 101 F.3d 453 (5th Cir. 1996), squarely endorsing its earlier opinion in *Hamilton, supra,* noting:

> We also note that, in 1994, Congress amended Sec. 547(c)(3)(B) to provide a grace period of 20 days rather than 10 . . . . It is difficult to see why Congress would have passed this amendment if it did not believe that the federal grace period in Sec. 547(c)(3)(B) prevails over conflicting state-law grace periods.

Id. at 442.

CONCLUSION

Fidelity's assertion that the issue presented is of significant importance to consumers who purchase automobiles and institutions which finance such consumer transactions is incorrect.

A normal consumer has no clue about security interests and the perfection thereof. Moreover, the issue is not between the debtor and a creditor; but, it is creditor versus creditor and the maximization of the Bankruptcy estate for the benefit of all of the creditors.

Fidelity may prefer the Missouri statute and its thirty day grace period, but the Congress did not chose to defer to state

law, even though it had that option. District Judge Smith in the case at bar noted many instances in which Congress specifically directed that the Bankruptcy Code defer to or adopt provisions of state law. The Bankruptcy Code is the law of the land unless the Congress opts out and leaves it to local practice. The Constitution says we must have uniform Bankruptcy Laws. The Congress would not have repeatedly expanded the ambit of 11 U.S.C. § 547(c)(3)(B) if it meant state law to control.

Further, the Trustee suggests that Fidelity's insistence on charging Ms. Beasley 20.85 percent interest in August, 1994 undermines its protestations. First, the bankruptcy surprise seems to have been factored into its "established commercial practice" as a similar loan from a commercial bank to a "non-distressed" borrower would be at a substantially lower rate. Second, only a debtor with soiled credit history would acquiesce to such a rate, thereby sounding an alarm to the prudent creditor. Third, a creditor with the foresight to assess such a rate of interest stretches credulity asserting it was not forewarned to perfect within the Bankruptcy Code's twenty days.

Illustrative of this "heads I win, tails you lose" view is the creditor's position in *In Re: Smallwood,* 1997 WL 33023 (Bkrtcy. E.D. Ky.). Here the Trustee wanted the court to follow state law, and it was the lender who argued that the bankruptcy 20 days trumps Kentucky's 10 days. The court agreed with the creditor and did not avoid the lien.

The Trustee requests the Supreme Court of the United States deny Fidelity's Petition for Writ of Certiorari.

Respectfully submitted,

RICHARD V. FINK, Trustee
Counsel of Record
Attorney for Respondent, Pro Se
818 Grand Boulevard
Suite 700
Kansas City, MO 64106-1910
(816) 842-1031